for The Defense

The Training Newsletter for the
Maricopa County Public Defender's Office

Volume 1, Issue 9 -- December 1991

Dean W. Trebesch,
Maricopa County Public Defender

Contents:

THOUGHTS ON TRAINING

By Dean Trebesch

Since most of us have been in the office only two or three years at most, it is difficult to relate back to "the way we were".

Times have changed, however. We have grown from 87 attorney positions to 182 since 1987 and from 135 total staff to 318. Office-wide, we are now being appointed to over 40,000 cases a year.

With these staff changes and difficult workloads, staff development has become a key feature in assuring competent as well as cost-efficient representation.

Since I have been here I have continually stressed quality representation and professionalism in all aspects of our work.

To assure the highest level of service, an emphasis has been placed on innovativeness and modernization. Whether it be client service coordinators, expert witness funding, law clerks, Lexis/Westlaw, the 1988 attorney classification plan, office computers, PPC, process servers, in-house interpreters, voice mail, or an improved ratio of secretaries -- this office has constantly sought ways to enhance the effectiveness of our legal services, notwithstanding financial constraints.

Above all, staff development has meant training. It has become mandatory for new office attorneys and emphasized for all attorneys. In my opinion, training opportunities have sharpened the skills of our attorneys and staff, while saving taxpayer money and improving office morale.

Yet, just four years ago this office had barely $18,000 to train our entire staff. Turnover had reached 55 percent. New attorneys were left to rely on their instincts and continuing education was virtually non-existent, unless paid for personally.

Instead, thanks to our 1989 legislation, last fiscal year we hosted 5 state-wide seminars, at which a cumulative total of 383 office attorneys were in attendance. In-state seminars were attended by 361 office attorneys, collectively, while a total of 177 attorneys participated in out-of-state seminars and workshops. In this time period, 25 investigators attended seminars and 18 other support staff availed themselves of these opportunities. If anything, I expect these totals to rise this fiscal year, especially in the area of support staff training.

I sincerely appreciate how enthusiastically you have sought to utilize our training resources. In my estimation, our clients and the criminal justice system have benefited immeasurably because of your continuing legal education.

The professionalism of this office is very important to me. Yet, a pleasant working environment where attorneys and employees feel they can use and develop their skills to the maximum, and be happy in the workplace, is essential to that professionalism, in my view. Without it, training and employee development can never achieve their stated objectives. In the end, training still needs the "human, caring touch" added to guarantee the highest quality of service. And that, in my opinion, is what makes this a truly special place to work. Ultimately, it has been each of you who, through training and commitment, has taken what would have been simply a huge law office and, instead, turned it into a friendly, conscientious, and spirited group of professionals.

Clearly, our training legislation has been successful in enhancing the quality of our services. I thank you for your involvement in our training and CLE efforts, and sincerely welcome any suggestions you may have on how to best use these funds. ^

Changing the Future

By Dean Trebesch

As we prepare to enter a new year, I would like everyone to have an opportunity to review our mission statement, and to reflect on how he or she can help manage change and create the best possible future.

MISSION STATEMENT

To provide, pursuant to constitutional and ethical obligations, effective legal representation for indigent persons facing criminal charges, juvenile adjudications and mental health commitments when appointed by Maricopa County Superior and Justice Courts.

VISION STATEMENT:

To achieve national recognition as an effective and dynamic leader among organizations responsible for legal representation of indigents.

GOALS:

* TO PROTECT THE RIGHTS OF OUR CLIENTS AND GUARANTEE THAT THEY RECEIVE EQUAL PROTECTION UNDER THE LAW
* TO ENHANCE THE PROFESSIONALISM AND PRODUCTIVITY OF ALL STAFF
* TO PURSUE THE DEVELOPMENT OF COST-EFFECTIVE ALTERNATIVES TO INCARCERATION
* TO PERFORM OUR OBLIGATIONS IN A FISCALLY RESPONSIBLE MANNER
* TO ENSURE THAT ETHICAL AND CONSTITUTIONAL RESPONSIBILITIES AND MANDATES ARE FULFILLED
* TO PRODUCE THE MOST RESPECTED AND WELL-TRAINED ATTORNEYS IN THE LEGAL COMMUNITY

FOR THE DEFENSE

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FOR THE DEFENSE is the monthly training newsletter published by the Maricopa County Public Defender's Office, Dean Trebesch, Public Defender. **FOR THE DEFENSE** is published for the use of public defenders to convey information to enhance representation of our clients. Any opinions expressed are those of the authors and not necessarily representative of the Maricopa County Public Defender's Office. Articles and training information are welcome and must be submitted to the editor by the 10th of each month.

NEW PUBLIC DEFENDER LIBRARY SERVICES

By Robert S. Briney

We have recently established a new "Reserve Library" to provide additional reference material for education and trial preparation. The new library is located on the tenth floor in the corner office at the end of the entry hallway. The library contains a number of "how to" books such as Evidentiary Foundations by Imwinkelreid, Investigation and Preparation of Criminal Cases by Bailey and Rothblatt, and Scientific Evidence in Criminal Cases by Moensses. In addition, the new library has a number of specialty books such as the Merck Manual and the Physician's Desk Reference, as well as written materials from office seminars.

(cont. on pg. 3)

Presently, the Reserve Library contains approximately fifty volumes. We intend to add additional books if funds are available. Books in the Reserve Library are available only on a sign-out basis and may be checked out for up to one week. A directory of available books is located in the main library. Review the directory to determine the book you want, then contact Elia Hubrich, the library manager. Her desk is located in the same room as the Reserve Library. Elia will obtain books for you. Please do not personally remove books from the Reserve Library.

We have also provided each trial group with a "mini-library" for quick reference purposes. Each mini-library contains a small number of commonly used reference books such as Search and Seizure by La Fave, Arizona Law of Evidence by Udall, the Arizona Appellate Handbook, Recommended Arizona Jury Instructions (Criminal), and the Criminal Law Outline. Additionally, each trial group library has received the Criminal Bench Survey and the FBI Handbook of Forensic Sciences. Copies of the Arizona Advance Reports are added every month. Each Juvenile office is furnished with a similar "mini-library" with volumes relating to juvenile practice. Books may be removed from the "mini-libraries" using a sign-out book located in the library. Please return books promptly as others may wish to use them.

Our appeals division library is located on the third floor of the Luhrs Building. The library contains a set of Arizona Revised Statutes, the Arizona Reporter, the Arizona Digest, and other books related to Arizona court decisions. The Criminal Law Reporter, Supreme Court Practice, Criminal Constitutional Law, and a variety of other volumes related to appellate practice are part of the appeals library. A notebook listing issues recently briefed by our appeals attorneys is also in the library. The notebook is a valuable resource to find research that has already been completed on important legal issues. Feel free to use the appeals library at your convenience, and to photocopy any information on the copier located near their library. Do not, under any circumstances, remove books from the appeals area.

The main Public Defender library remains on the tenth floor of the Luhrs Building. The main library contains a variety of significant references such as the Supreme Court Reporter, Federal Reporter, Federal Supplement, Pacific Reporter, and related digests and Shepards, ALR 2nd, 3rd, and 4th, Am Jur 2nd, the Attorney's Dictionary of Medicine, and Wharton's Criminal Evidence. A wide variety of other reference sources are also located in the main library. Additionally, we use this library as a repository for a number of books no longer kept current and a few older treatises that may be a bit out-of-date. A copy machine is located in the office next to the library. Books should not be removed from the main library.

At the present time, there are a number of books missing from our libraries. Among the absent books are: Defense of Drunk Driving Cases by Irwin, Courtroom Criminal Evidence by Imwinkelreid, Law of Probation and Parole, and several others. If you locate any of our missing books, please contact Elia at 8221 and arrange to return them.

The following is a list of books in the Public Defender library system:

Reserve Library

AMA Guide to Prescriptions & OTC Drugs - Random House

AZ Courtroom Evidence Manual by McClennan

AZ Recommended Jury Instructions - AZ Bar

AZ Statistical Abstract by Nat D. Gennaro - Univ. of AZ

Courtroom Communication Strategies by Malandro & Smith - Kluwer Criminal Aspects of Tax Fraud Cases 3rd edition by Kostelanetz & Bender - ALI-ABA

Criminal Bench Survey

Criminal Law Outline - National Judicial College

Defense of Narcotics Cases (Vols. I, II, & III) by David Bernheim - Matthew Bender

Diagnostic & Stat. Manual of Mental Disorders III (soft) - APA

Drunk Driving Defense, 2d by Lawrence Taylor - Little Brown & Co.

DWI Journal Law & Science Newsletter - Whitaker

Entrapment Defense by Paul Marcus - Mitchie Co.

Evidentiary Foundations by Edward Imwinkelreid - Mitchie Co.

Eyewitness Testimony, Strategies & Tactics by Arnold et al - Shepard's

Eyewitness Identification by Nathan Sobel - Clark Boardman

FBI Handbook of Forensic Sciences - US Printing Office

Forensic Science (Vols. I, II, III, IV) by Cyril Wecht - Matthew Bender

Fundamentals of Trial Techniques by Thomas Mauet - Little, Brown & Co.

How to Prepare Witness for Trial by Aron & Rosner - Shepard's

Immigration Law Source Book by Ira Kurzban - AILA

Investigation & Preparation of Criminal Cases by Bailey & Rothblatt - Lawyer's Coop

Jury Argument in Criminal Cases by Ray Moses - Azimuth Press

Jury Work Systematic Tech. (Vols. I & II) by National Jury Project - Clark Boardman

Jury Selection in Civil & Criminal Trials by Ann Ginger - Lawpress

Merck Manual

Modern Microcrystal Tests for Drugs by Foulton & Wiley-Interscience

Phoenix Police Department Policies

Physician's Desk Reference - Barnhart

Professional Responsibility of the Criminal Lawyer by John Wesly Hall, Jr. - Clark Boardman

Prosecution & Defense of Sex Crimes by Paul Marcus - Matthew Bender

Prosecution and Defense of Criminal Conspiracy Cases by Paul Marcus - Matthew Bender

Prosecutorial Misconduct by Joseph Lawless - Kluwer

Public Defender Seminar Information

Reconstructing Reality in the Courtroom by Bennett & Feldman - Rutgers University Press

Scientific Evidence in Criminal Cases by Moenssens et al - Foundation Press

(cont. on pg. 4)

Shooter's Bible - Stoeger
Successfull Techniques for Criminal Trials 2nd edition by Bailey & Rothblatt
Supreme Court Practice by Stern et al - BNA
Trial Communication Skills by Aron et al - Shepard's
Trial Psychology by Margaret Roberts - Butterworth Legal Publishers
Uncharged Misconduct. Evidence by Edward Imwinkelreid - Callahan
Uniform Traffic Control Devices - US Printing Office

Trial Group

AZ Advance Reports - Code Co
AZ Advance Reports Index - Code Co
AZ Appellate Handbook - State Bar of AZ
AZ Courtroom Evidence Manual by McClennan - State Bar of AZ
AZ Law of Evidence by Udall et al - West
AZ Recommended Jury Instructions - State Bar of AZ
AZ Revised Statutes
Criminal Bench Survey
Criminal Law Outline - National Judicial College
FBI Handbook of Forensic Sciences - US Printing Office
Georgetown Law Journal
How to Defend a Drunk Driving Case by John Hingston - Clark Boardman
Prosecutorial Misconduct by Bennett Gershman - Clark Boardman
Search & Seizure by Wayne LaFave - West

Appeals

AZ Advance Reports Index - Code Co
AZ Advance Reports - Code Co
AZ Appellate Handbook - State Bar of AZ
AZ Blue & White Book - West
AZ Business Gazette
AZ Case Names Citator - Shepard's
AZ Courtroom Evidence Manual by McClennan - State Bar of AZ
AZ Digest - West
AZ Digest 2nd - West
AZ Digest 2nd Law Finder - West
AZ Express - Shepard's
AZ Law of Evidence by Udall et al - West
AZ Legislative Service - West
AZ Recommended Jury Instructions - Criminal - State Bar of AZ
AZ Reporter Citations - Shepard's
AZ Reports - West
AZ Revised Statutes
Criminal Constitutional Law by Rubenstein et al - Matthew Bender
Criminal Law News - West
Criminal Law Outline - National Judicial College
Criminal Law Review - Clark Boardman
Criminal Law Reporter - BNA
Diagnostic & Stat. Manual of Mental Disorders III (soft) - APA
Georgetown Law Journal - Readmore
Physician's Desk Reference - 1989
Prosecutorial Misconduct by Joseph Lawless - Kluwer
Prosecutorial Misconduct by Bennett Gershman - Clark Boardman
Searches & Seizures & Confessions Vols. I, II, & III by Ringel - Clark Boardman
Search & Seizure Vols. I, II & III by Wayne LaFave - West
Supreme Court Practice by Stern et al - BNA
Miscellaneous non-current volumes

Main Library

ALR 2nd - Lawyer's Coop
ALR 3rd - Lawyer's Coop
ALR 4th - Lawyer's Coop
ALR Citations - Shepard's
ALR Digest - Lawyer's Coop
ALR Index to Annotations - Lawyer's Coop
AM Jur 2d & New Topic Service - Lawyer's Coop
Attorney's Dictionary of Medicine - Matthew Bender
AZ Advance Reports - Code Co
AZ Advance Reports Index - Code Co
AZ Appellate Handbook (Vols. I, II, III)
AZ Courtroom Evidence Manual by McClennan - State Bar of AZ
AZ Law Review - Readmore
AZ Law of Evidence by Udall - West
AZ Revised Statutes (2)
California Jury Instructions - West
California - Arizona Legal Directory
Criminal Law Digest - Warren, Gorham & Lamont
Criminal Law Outline - National Judicial College
Fed. Prac. Digest 4th - West
Federal Citations - Shepard's
Federal Case Names Citator - Shepard's
Federal Reporter - West
Federal Supplement - West
McCormick on Evidence - West
Pacific Digest - West
Pacific Reporter - West
Pacific Reporter Citations - Shepard's
Probation and Parole Law Reports - Readmore
Rules of Court - West
Supreme Court Reporter - West
Supreme Court Practice by Stern et al - BNA
Uniform Traffic Control Devices - US Printing Office
US Citations - Shepard's
US Supreme Court Digest - West
US Supreme Court Case Names Citator - Shepard's
Wharton's Criminal Evidence Vols. 1, 2, 3 & 4 - Lawyer's Coop.
Miscellaneous non-current volumes

(cont. on pg. 5)

Juvenile

AZ Advance Reports Index - Code Co
AZ Advance Reports - Code Co
AZ Appellate Handbook - State Bar of AZ
AZ Courtroom Evidence Manual by McClennan - State Bar of AZ
AZ Criminal Law Outline - National Judicial College
AZ Law of Evidence by Udall - West
AZ Revised Statutes
FBI Handbook of Forensic Sciences - US Printing Office
Georgetown Law Journal - Readmore
Juvenile Law Digest - National Council of Juvenile & Family Court Judges
Rights of Juveniles by Samuel Davis - Clark Boardman
Search & Seizure Vols. I, II, & III by Wayne LaFave - West

Mental Health

Mental & Physical Law Reporter ^

ON DUI

By Donna Elm

Your client is arrested for DUI. The police read him Miranda. They record, usually word-for-word, his response. It is something stupid -- not a clear yes or no. You cringe because it makes him sound drunk.

Cringe not. The happy coincidence of two areas of law, facts from DUI reports, and local police training may give you a dismissal. The rule is that if a DUI suspect, during the time when he could get an independent blood test, makes an equivocal or ambiguous request for counsel, and if the police fail to clarify that request, the DUI charge must be dismissed.

The dismissal is based on Fifth and Sixth Amendment rights to counsel, Miranda v. Arizona, 384 U.S. 436 (1966) and Gideon v. Wainwright, 372 U.S. 335 (1963), and preventing a suspect from gathering exculpatory evidence before it dissipates, McNutt v. Superior Court, 133 Ariz. 7, 648 P.2d 122 (1982). DUI has the "unique circumstances" that scientific evidence challenging intoxication can only be gathered during a few hours after arrest. Montano v. Superior Court, 149 Ariz. 385, 719 P.2d 271 (1986).

Arizona has a small body of law addressing the right to counsel specifically during the critical DUI testing period. In McNutt, the case was dismissed when the police denied the suspect an attorney call because it precluded him from getting an independent test. Though McNutt asked for independent testing, the case still must be dismissed even when a suspect never asks for an independent test and only wants to call his lawyer. State v. Holland, 147 Ariz. 453, 711 P.2d 592 (1985). That is because "it is impossible to see what advice would have been given defendant had he been able to confer privately with counsel. It is quite possible he would have been instructed to obtain . . . exculpatory evidence". Holland. The only restriction is if allowing the telephone call would truly hinder investigation. State v. Juarez, 161 Ariz. 76, 775 P.2d 1140 (1989).

The request for counsel does not have to be clear. Miranda established that invoking counsel can be made "in any manner". Asking to speak with "somebody" right after Miranda warnings, asking whether an attorney is needed, saying he might want an attorney, inquiring who is a good attorney, etc., could be invocations of counsel. 83 A.L.R.4th 443 (detailing what constitutes asserting right to counsel). If the statement is equivocal (uncertain or hedging) or ambiguous (has more than one meaning), it raises the invocation of counsel issue. State v. Inman, 151 Ariz. 413, 728 P.2d 283 (App. 1986); State v. Finehout, 136 Ariz. 226, 665 P.2d 570 (1983). When a suspect makes such a questionable request, the police must clarify whether he in fact wants to speak to an attorney; if they do not, they deprive him of counsel.

The DUI report itself usually includes precisely what your client said after he was advised of Miranda. Look at it. If he said anything but a clear yes or no, determine if you have an equivocal or ambiguous request for counsel. You need to interview officers to see whether they clarified the statement. Luckily, few local officers have been trained that they must clarify such requests. Most will tell you with utmost confidence that your client did not specify he wanted an attorney (for instance, he only stated he wanted to make his phone call), so they dropped the issue. That failure mandates dismissal. Write your motion!

The State may respond that your client had no right to consult counsel before testing, citing Campbell v. Superior Court, 106 Ariz. 542, 479 P.2d 685 (1971). But Campbell does not apply to criminal matters. The State may argue that the proper remedy is suppression. But Holland indicates that dismissal is mandatory; moreover, Juarez's result is distinguished because those defendants never indicated, ambiguously or not, that they wanted counsel. Bear in mind that the State has the burden to show that the right to counsel was not violated, so your client never has to testify what he meant.

Note that the requirement to clarify ambiguous or equivocal invocations applies to the right not to answer questions as well, though the remedy there is suppression of statements.

So don't cringe next time you see that your client slurred out, "I'd want an attorney, but even an attorney couldn't save me now." It may be his ticket home. ^

NEWS FROM THE RECORDS SECTION

By Dave Bynum*

A metamorphosis of sorts is taking place in the Records Section. The days of clutter, boxes piled precariously high next to desks, and other general unneatness is rapidly coming to an end. What we have eagerly awaited is a work environment free of cramped conditions, wide open with maximum use of floor space, and pleasing to the eye. The renovation of the Records Section is nearly half-completed. It will result in a more efficient, organized work situation that will benefit our entire office.

(cont. on pg. 6)

We ask that everyone continue to bear with us for a while longer. New computer and phone lines are being installed and the newly carpeted half of the Records Section is now functioning. As some of the phone numbers for Records have changed, refer to up-coming memorandums.

Future goals for the Records Section focus on more cross-training and modifications to the computer case file tracking system to make it more user friendly. Presently some of the problems associated with closing the case files and finding the right disposition codes are being addressed. This will, in time, enable the amount of information input into the computer to be done so in a more timely manner. The amount of cases and the resultant paperwork that is required to track the cases can be overwhelming at times.

After attending a very useful workshop in Atlanta the first week of December, I have decided to look at many options to better meet the needs of this office. Although the workshop dealt primarily with personnel matters, a number of interesting management ideas were presented. Included was an explanation of paradigms and the impact they have on the way we think about problem solving. To define paradigms would be beyond the scope of this article; however, the relevant significance of this pattern of thinking is to be open to new ideas and not reject ideas based on preconceived notions of how things have been done in the past. Therefore, we look forward to exploring changes in the Records Section that may never have been tried. After all, changes involve risk, and as has been proven many times before, they can result in vast improvements if given half a chance. The Records Section is committed to doing all we can to serve this office and ultimately our clients more effectively.

***EDITOR'S NOTE:** Dave Bynum is the Records Manager.

ARIZONA ADVANCED REPORTS

Volume 97

State v. Campos
97 Ariz. Adv. Rep. 22, October 8, 1991 (Div. 2)

Defendant was tried on theft and burglary charges. Combined with allegations of priors and release status, the cumulative punishment could exceed 30 years. The trial court impaneled an eight-person jury to try the case. Defendant was convicted of theft with two prior convictions and acquitted of the burglary charge. He was sentenced to an aggravated sentence of 12 years. Defendant contends that he was entitled to a 12-person jury as a matter of right and his conviction by an eight-person jury must be reversed. Defendant would have received a sentence in excess of 30 years only if the sentences had run consecutively. Under A.R.S. Section 13-116 and State v. Gordon, 161 Ariz. 308 (1989), the sentences could not have run consecutively. Further, as he is now acquitted of one charge, he cannot be retried on that charge and would now only be entitled to an eight-person jury. Neither the Arizona Constitution nor the Arizona statutes now require reversal.

State v. Cifuentes
97 Ariz. Adv. Rep. 26, October 10, 1991 (Div. 2)

Defendant, a Guatemalan, is stopped at the border in a stolen 1989 Isuzu with a forged registration and stolen license plates. Defendant was convicted of theft, trafficking in stolen property and forgery. At trial, a police detective was allowed to testify that there was a Guatemalan car theft ring in the Los Angeles area which stole Japanese four-wheel drive vehicles and forged registrations to take them across the border. This evidence invited the jury to infer the defendant knew his car was stolen because he was part of this Guatemalan car theft ring. This evidence was inadmissible for three reasons. First, the officer's information related to thefts after the defendant's arrest. Second, use of profile evidence to indicate guilt is always suspect; it creates too high a risk that a defendant will be convicted not for what he did but for what others are doing. Third, it is impermissible to use ethnicity to prove guilt.

Goode v. Superior Court
97 Ariz. Adv. Rep. 27, October 10, 1991 (Div. 2)

The Arizona Board of Regents has statutory authority to establish a police force.

State v. Parsons
97 Ariz. Adv. Rep. 23, October 8, 1991 (Div. 2)

Defendant was charged with one count of burglary and two counts of aggravated assault. The trial judge directed a verdict on one of the aggravated assault charges but permitted the jury to consider the lesser-included offense of attempted aggravated assault. The jury convicted the defendant of burglary and aggravated assault but acquitted him of attempted aggravated assault. The jury also found that the allegation of dangerousness had not been proven beyond a reasonable doubt. Defendant claims that he is entitled to a new trial because of inconsistent verdicts. While defendant acknowledges that Arizona courts do not require consistency in verdicts, defendant claims this case is different because it involves a special verdict on an element of the offense. The issue was properly submitted to the jury, which was nevertheless free to make its own finding.

Prior to trial, defendant agreed to plead guilty to endangerment as a class 6 open-ended felony. Before the change-of-plea hearing, both counsel realized that endangerment cannot be an open-ended offense. The State also learned that defendant was on probation and had more prior felonies than first known.

(cont. on pg. 7)

The trial judge found it was ineffective assistance of counsel to fail to push through the plea agreement but concluded that the State would have withdrawn upon learning of the other priors. Defendant claims that the trial court erred in permitting the State to have the benefit of knowledge it would not have had at the time the plea should have been entered. The defendant may not seek equitable relief in order to perpetrate a fraud on the court. Once both parties discovered that endangerment could not be treated as an open-ended offense, there was no agreement to enforce.

State v. Schaaf
97 Ariz. Adv. Rep. 3, October 8, 1991 (S.Ct.)

Defendant is convicted of first degree murder and other offenses. He is sentenced to death. The defendant was advised that there would be an automatic appeal from his death sentence but that he would have to file a timely notice of appeal with regard to the other counts. Defendant did not file notice of appeal and waived review of any appeal other than the conviction and sentence for first degree murder.

Before trial, defendant's lawyer was appointed a judge. His attorney was allowed to withdraw and the six days it took to find another attorney were excluded from time limits. Defendant first claims that his right to a speedy trial was violated by excluding these six days. There was no showing that his original attorney was ready to try the case and defendant has shown no prejudice. Further, extraordinary circumstances existed and the defendant did not exert his constitutional right to a speedy trial during trial.

Defendant claims that excluding the six days to appoint new counsel violated Rule 8. Absence of key court personnel is an extraordinary circumstance for purposes of Rule 8. Further, defendant had waived Rule 8 time limits on other occasions.

Defendant claims that his right to a speedy trial under the Interstate Agreement on Detainers was violated. Under the I.A.D., the court may grant any necessary or reasonable continuance. The need to change counsel is an extraordinary circumstance. Further, the good cause standard of the I.A.D. is a lesser standard than the extraordinary circumstance standard of Rule 8.

Prior to trial, defendant's lawyer was appointed a judge. Defendant claims that his right to counsel was violated when his attorney withdrew. Although a defendant is entitled to representation, he is not constitutionally entitled to any particular lawyer. Defendant also claims that his attorney's withdrawal violated Rule 6.3 because the motion to withdraw did not designate a substituting attorney nor contain a signed statement that the new lawyer would be prepared for trial. Defendant's right to counsel was not prejudiced. There is no evidence that his first attorney was ready to go to trial nor any basis to believe that withdrawal caused any significant delay. The motion to withdraw showed proper good cause and defendant was not denied his right to counsel.

Defendant claims that the trial court prevented him from representing himself by temporarily denying his motion to represent himself. While the trial judge did at first deny defendant's right to represent himself citing a lack of legal training, the trial judge later reversed that ruling. The trial judge corrected the error by later granting defendant's motion and trial did not take place until nearly one year later. No prejudice occurred.

During *voir dire* questioning, perspective jurors were asked questions about their position regarding capital punishment. Defendant claims that no rational reason exists to death qualify the jury because jurors in Arizona do not make sentencing decisions. Death qualifying of juries during *voir dire* is appropriate to determine whether their views would prevent or substantially impair their duty to decide the case.

Defendant claims that the trial court erred in permitting the State to call defendant's expert witness to testify for the prosecution. The defendant did not properly object at trial and waived the issue on appeal. Further, defendant objected at trial only on the basis that the expert testimony would be cumulative. An evidentiary theory advanced for the first time on appeal will not be considered. Finally, it is within the trial court's discretion to determine whether an expert witness will be required to testify, even if it was the other party who initially retained that witness.

After the State rested, the defense was allowed to present its witnesses. The defense rested without calling any witnesses. The trial judge stated on the record, "It's obviously concluded a little more rapidly than we had anticipated". Defendant claims that this phrase impermissibly indicated to the jury that the judge was surprised that the defendant was not going to present a case. While it is constitutionally impermissible for a trial judge to comment on a defendant's failure to testify, a comment is impermissible only if the language used was intended to be taken as a comment on the failure to testify. At *voir dire*, the jury had been told how long the trial might be and it ended approximately three weeks earlier than anticipated. The judge's comment was merely a statement that the case was concluding earlier than anticipated and cannot reasonably be interpretated as a comment upon defendant's failure to testify.

Defendant claims the death penalty was improperly imposed because his Nevada convictions for attempted murder with a deadly weapon are not necessarily crimes involving the use or threat of violence on another person. To qualify as an aggravated circumstance, the statutory definition of a conviction must involve violence or the threat of violence on another person. The court may consider only the statute that defendant violated. It may not consider other evidence to establish the violence element. Because the Nevada statute does not require violence, the conviction may not be used as aggravating circumstance under A.R.S. Section 13-703. The death sentence is reversed.

(cont. on pg. 8)

Volume 98

State v. Brady
98 Ariz. Adv. Rep. 32, October 15, 1991 (Div. 1)

Defendant is convicted of sexual assault and was ordered to pay restitution for the victim's moving expenses. Defendant claims that moving expenses are consequential damages not recoverable as restitution. A.R.S. Section 13-104(11) defines economic loss as any loss, but excludes consequential damages. Losses directly attributable to the offense are appropriate items for restitution. The victim received threats during and after the offense. Restitution is warranted in this case because of the very real threat to the victim's safety. [Presented by James L. Edgar, MCPD]

State v. Estrada
98 Ariz. Adv. Rep. 68, October 22, 1991 (Div. 2)

At the defendant's probation violation hearing, he admitted possessing a weapon and a dirty urine analysis. The defendant was not advised that he could be prosecuted for drug and firearm possession. Rule 27.8(e) prevents a probationer from suffering unanticipated consequences as a result of an admission. The remedy is to preclude the State from using these statements in any subsequent prosecution. The error is harmless error.

Defendant's probation was revoked and he was sentenced to four years imprisonment. Defendant claims the trial court failed to consider his substance abuse problem as a mitigating factor. The record indicates that both mitigating and aggravating factors were presented to the court, which imposed the presumptive sentence. No abuse of discretion appears.

State v. Huerta
98 Ariz. Adv. Rep. 56, October 24, 1991 (Div. 1)

During *voir dire*, one prospective juror indicated that the defendant was probably guilty because he was charged with two counts of child molestation. The judge did not rehabilitate the juror and denied a motion to strike for cause. Defense counsel used a preemptory challenge to remove the juror. The court's denial of the motion to strike was an abuse of discretion. However, defendant did not claim he was forced to accept a juror that he would have peremptorily stricken. A defendant's right to an impartial jury is not violated as long as the jurors who remain are impartial. (Compare Ross v. Oklahoma, 487 U.S. 81 (1988) with State v. Sexton, 163 Ariz. 301 (App. 1989)).

At trial, a social worker told the jury that she found the molestation victim to be a credible witness. An objection was sustained and the jury was instructed to disregard the statement. Defendant claims the trial judge should have granted a mistrial. The testimony was stricken and no motion for mistrial was made. No abuse of discretion appears. Defendant also claims that the social workers were improperly allowed to testify as to the quality of statements made by child sexual abuse victims in general. The jury does not need any expert testimony concerning a person's truthfulness. However, the testimony given about the differences between a child's experience and a made-up story did not relate specifically to the victim nor quantify the number of victims who testify truthfully. The expert testimony, if error, is not reversible error.

At trial, the jury saw videotapes of the victim's interview with the social workers. Both social workers testified regarding the victim's statements. Defendant claims this testimony was hearsay and unfairly corroborated the victim's statements. The testimony was admitted under the residual exception to the hearsay rule, Rule 803(24). The social workers' testimony had sufficient guarantees of trustworthiness. The testimony was evidence of a material fact, more probative than other evidence, and served the interests of justice. Further, any error was harmless because the defendant is not appealing the admission of the actual interview tapes. The testimony was also not cumulative.

State v. Mokake
98 Ariz. Adv. Rep. 76, October 29, 1991 (Div. 2)

Defendant was charged with murder and other offenses. At trial, the testimony of key witnesses was admitted by way of pretrial videotaped depositions. When defendant objected, the prosecutor presented a letter from the U.S. State Department. The letter outlined the procedure for subpoenaing witnesses in Lesotho and noted that all witnesses were available. The prosecution failed to make a good faith effort to obtain the presence of the witnesses. There was no attempt to have the witnesses appear voluntarily and no attempt to issue or serve subpoenas.

The error was also not harmless. The defense was insanity and the witnesses could have given testimony as to the defendant's behavior and demeanor.

State v. Thompson
98 Ariz. Adv. 53, October 24, 1991 (Div. 1)

In a supplemental opinion to State v. Thompson, 167 Ariz. 230 (1990), Division 1 considers whether testimony inadmissible under the residual hearsay exception [Rule 803(24)] is admissible as an excited utterance or diagnostic statement.

The State urges that the child's statements to a classmate and school health aide were admissible as excited utterances (Rule 803(2)). The trial judge did not decide whether the statement was an excited utterance and the appellate court independently considers the record to determine whether the testimony was so admissible. Hearsay statements are admissible as an excited utterance only upon some proof that the declarant did not engage in reflective thought. Where substantial time elapses, the court must determine where the declarant is still speaking under the stress of nervous excitement or shock produced by the act or whether the nervous excitement has died away so that the remark is elicited by some other shock. The court notes that there was a four-hour interval between the event and the statement.

(cont. on pg. 9)

The evidence in the record reveals reflective thought on the part of the declarant and the declarant did not exhibit the requisite unusual behavior or emotional response characteristic of the stress of excitement. The testimony was inadmissible as an excited utterance.

The State argues that the videotape interview of a social worker is admissible as a statement made for the purpose of medical diagnosis or treatment (Rule 803(4)). The crucial question is whether the declarant's out-of-court statements were reasonably pertinent to diagnosis or treatment. The counselor characterized the videotape session as a forensic interview. The interview was not followed by any treatment session. The child's physician never saw the tape. The child's counselor did not indicate that she relied upon the tape for her ongoing treatment of the child. Nothing in the record indicates that this taped interview was pertinent much less critical to effective diagnosis or treatment.

Taylor v. Sherrill
98 Ariz. Adv. Rep. 17, October 24, 1991 (S.Ct.)

Defendant turned left into on-coming traffic, causing an injury accident. He receives several civil traffic tickets and is found responsible by default. He is also indicted on felony charges of aggravated assault and criminal damage. Defendant claims that the double jeopardy clause of the United States Constitution barred prosecution for felony assault or criminal damage because the default civil judgments placed him in jeopardy under Grady v. Corbin, 110 S.Ct. 2084 (1990). The Supreme Court notes that the facts of Grady are nearly identical to this case. However, the court holds that civil default judgments are not prosecutions for double jeopardy purposes because the proceedings were not criminal in nature. Grady applies only when the conduct at issue has been charged and tried in a prior prosecution.

Defendant also claims that he has been doubly punished for these offenses. The government may impose both criminal and civil penalty for the same act or admission. A disproportionately large civil sanction imposed in subsequent civil proceedings can, under certain limited circumstances, constitute improper multiple punishment, United States v. Halper, 109 S.Ct. 1892 (1989). The defendant bears the burden of demonstrating that a civil sanction constitutes punishment under the double jeopardy clause. The record shows only that a default judgment was entered against him. The record does not indicate the amount of these judgments or if the defendant paid them. The maximum sanction would have been $250 per ticket. Defendant also claims that his license was suspended. The record does not support this assertion and A.R.S. Section 28-1058 provides that licenses may be suspended if the defendant fails to appear. Suspension is not authorized for speeding or lane change violations.

Volume 99

State v. Calderon
99 Ariz. Adv. Rep. 29, November 6, 1991 (Div. 2)

Defendant pled guilty to conspiracy to sell over eight pounds of marijuana and was sentenced to 12 years. Defendant contends that the sentence was excessive because the trial judge did not find his remorse as a mitigating factor. While remorse may be a factor, the trial judge did not abuse his discretion in failing to consider it as a mitigating factor here.

Defendant also contends that the trial court erred in finding the presence of an accomplice as an aggravating factor because an accomplice is necessary for a conspiracy. On reconsideration, the trial judge agreed that it should not have relied upon this aggravating factor. Any error was harmless.

Defendant also contends that the court should not have considered a 15-year-old conviction for a similar offense as an aggravating factor. A.R.S. Section 13-702(D)(11) provides that the trial court shall consider felony convictions within the past ten years. However, under A.R.S. Section 13-702(D)(13), the court may consider convictions older than ten years.

Volume 100

State ex rel. Romley v. Hall
100 Ariz. Adv. Rep. 8, November 21, 1991 (S.Ct.)

The trial judge granted a defense motion to dismiss an allegation of dangerousness where the same conduct was also an element of the offense. The State filed a petition for special action and the Court of Appeals granted relief. The Arizona Supreme Court granted review. Subsequently, the State dismissed the allegation of dangerousness and the defendant requested the court dismiss his petition. As the issue is now moot, the petition for review is dismissed. [Presented by James J. Haas, MCPD]

State v. Engram
100 Ariz. Adv. Rep. 14, November 19, 1991 (Div. 1)

In a supplemental opinion, the Court of Appeals notes that a cited case, State v. McDonald, 70 Ariz. Adv. Rep. 54, has been depublished. A depublished opinion is not authority and cannot be cited. The Court of Appeals affirms its earlier opinion on separate grounds that the defendant did not request a lesser-included offense instruction. Failure to request this instruction waived the issue absent fundamental error. No fundamental error occurred.

(cont. on pg. 10)

State v. Nieto
100 Ariz. Adv. Rep. 15, November 19, 1991 (Div. 1)

At sentencing, the judge ordered that the Department of Corrections calculate defendant's presentence incarceration credit. A.R.S. Section 13-709 imposes this responsibility on the trial judge at the time of sentencing. Making DOC do this deprives the parties of an opportunity to dispute the matter at sentencing and leaves the calculation undetermined until after the time for an appeal has expired. ^

TRAINING CALENDAR

January 02-12

The National Institute for Trial Advocacy presents its Southern California Regional NITA "An Intensive Skills Program in Trial Advocacy" in cooperation with Loyola Law School in Los Angeles, California.

January 06-11

The National Institute for Trial Advocacy presents its "The Master Advocates Program" for advanced and experienced litigators at the University of California School of Law in Berkeley, California.

January 10

New Attorney Training in the Public Defender Training Facility at 11:00 a.m. Topic to be announced.

January 17

The Arizona State Bar presents "The Keys to Effective Trial Advocacy" at the Phoenix Mountain Preserve Reception Center from 8:30 a.m. until 4:15 p.m. Speaker is noted author James McElhaney.

January 18 & 19

AACJ presents "Defending the Difficult Case: Avoiding Big Brother Convictions" in Prescott, Arizona. Faculty includes Sam Guiberson, Tom Henze, Nancy Hollander and Howard Varinsky.

January 24

New Attorney Training in the Public Defender Training Facility at 11:00 a.m. Topic to be announced.

January 31

New Attorney Training in the Public Defender Training Facility at 11:00 a.m. Topic to be announced.

February 28-March 01

The National Criminal Defense College presents "Advanced Cross-Examination" in Atlanta, Georgia.

March 06

The Maricopa County Public Defender's Office presents "Juvenile Justice Issues: Evaluating the Child" at the Maricopa County Board of Supervisors' Auditorium. The morning speaker will be nationally known clinical psychologist Dr. Toni Cavanagh Johnson.

March 15-18

The National Council of Juvenile and Family Court Judges and National District Attorneys Association present the 19th National Conference on Juvenile Justice in Orlando, Florida.

April

The Maricopa County Public Defender's Office presents "DUI: Cross Examination of the Criminalist and Other Trial Practice Issues".

NOTE: Additionally, noted trial attorney and teacher Terry McCarthy will be the speaker for an upcoming trial practice seminar. Mr. McCarthy is the Federal Public Defender for Chicago, a renowned speaker and faculty member of the National Criminal Defense College in Macon, Georgia. ^

NOVEMBER JURY TRIALS

October 28

Stephen M.R. Rempe: Client charged with child molestation. Trial before Judge Hall ended October 30. Defendant found guilty. Prosecutor D. Reh.

October 30

Susan W. Bagwell: Client charged with attempted sexual assault. Trial before Judge Ryan ended November 04. Defendant found not guilty of attempted sexual assault but guilty of misdemeanor assault. Prosecutor J. Heilman.

October 31

Douglas K. Harmon:Client charged with aggravated assault (dangerous) with one (1) prior while on parole and possession of marijuana. Trial before Judge Grounds ended November 05. Defendant found guilty. Prosecutor T. Glow.

November 04

Robert C. Corbitt: Client charged with aggravated DUI. Trial before Judge Hall. Defendant found guilty. Prosecutor R. Nothwehr.

J. Scott Halverson: Client charged with aggravated DUI. Trial before Judge Portley ended November 09. Defendant found not guilty. Prosecutor Miller.

(cont. on pg. 11)

November 07

Vonda L. Wilkins: Client charged with aggravated robbery. Trial before Judge Portley ended November 11. Defendant found guilty. Prosecutor M. Barry.

Jeffrey A. Williams: Client charged with DUI. Trial before Judge Schneider ended November 15. Defendant found guilty. Prosecutor R. Nothwehr.

November 12

Eric G. Crocker: Client charged with burglary and attempted sexual assault. Trial before Judge Katz ended November 15. Defendant found not guilty. Prosecutor R. Campos.

November 13

James P. Cleary: Client charged with sexual assault. Trial before Judge Dougherty ended November 27. Defendant found not guilty. Prosecutor P. Hearn.

Elizabeth S. Langford: Client charged with aggravated DUI. Trial before Judge Sheldon ended November 15. Defendant found guilty. Prosecutor Miller.

John F. Movroydis: Client charged with aggravated assault. Trial before Judge Cole ended November 18. Defendant found not guilty. Prosecutor V. Harris.

November 14

Donna L. Elm: Client charged with DUI. Case dismissed by Judge Martin. Prosecutor M. Spizzirri.

Darius M. Nickerson: Client charged with possession of marijuana with priors. Trial before Judge Galati ended November 18. Defendant found guilty. Prosecutor R. Knapp.

November 18

Robert W. Doyle: Client charged with inhaling toxic vapors. Trial before Judge Hertzberg ended with a hung jury November 21. Prosecutor B. Bayer.

Gerald A. Williams: Client charged with kidnapping and aggravated assault. Trial before Judge Hall. Defendant found not guilty and guilty, respectively. Prosecutor J. Bernstein.

November 19

Susan W. Bagwell: Client charged with resisting arrest. Trial before Judge Martin ended with a hung jury November 21. Prosecutor J. Blake.

Nicholas S. Hentoff: Client charged with theft. Trial before Judge Schneider ended November 21. Defendant pled before jury selection. Prosecutor L. Schroeder-Nanko.

November 20

Douglas K. Harmon: Client charged with sexual conduct with a minor. Trial before Judge Grounds ended November 26. Defendant found guilty. Prosecutor A. Williams.

November 21

Larry Grant: Client charged with possession of narcotic drugs. Trial before Judge D'Angelo ended November 26. Defendant found guilty. Prosecutor C. Richards.

November 26

C. Daniel Carrion: Client charged with DUI. Trial before Judge Hotham ended December 03. Defendant pled after jury selection. Prosecutor M. Spizzirri.

Stephen J. Whelihan: Client charged with DUI. Trial before Judge Dann ended November 28. Defendant found not guilty. Prosecutor L. Baker.

CORRECTIONS

October 01

Mark J. Berardoni: Client charged with burglary and possession of burglary tools. Trial before Judge Galati ended October 08. Defendant found guilty on charge of burglary and acquitted on charge of possession of burglary tools. Prosecutor L. Schroeder-Nanko.

BULLETIN BOARD

Medical Summaries

Rebecca Potter's father, who is a physician, has agreed to assist our office by reviewing and summarizing medical records for a reasonable fee. Public defenders interested in using this service should contact Rebecca Potter at 506-8258.

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Speakers' Bureau

Our office is in the process of establishing a Speakers' Bureau so that we will have a ready list of attorneys who are willing to speak to various groups on the subject of the Public Defender's Office and related legal issues. If you are interested in participating, please contact Georgia Bohm in our Training Section.

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Subscriptions

FOR THE DEFENSE, Copyright, a Maricopa County Public Defender's Office monthly Training Newsletter. A limited number of subscriptions are available at $15.00 per year, for a subscription period of October 01 through September 30. For information, please telephone the staff at (602) 506-8200.

Happy Holidays from the Office of the Public Defender